Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-384.

ROBERT J. BENSON,

Petitioner,

v.

AMERICAN EXPORT ISBRANDTSEN LINES, INC.,

Respondent,

v.

ATLANTIC & GULF STEVEDORES, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF IN OPPOSITION.

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INDEX TO BRIEF.

	Page
Brief in Opposition	1
Counter-Statement of the Question Presented	1
Constitutional Provisions	2
Counter-Statement of the Case	2
Counter-Argument	8
Conclusion	13

TABLE OF CITATIONS.

Cases:	Page
Ballwanz v. Tarka Corp. of Baltimore, 382 F. 2d 433 (4 Cir. 1967)	11
Brown v. Ivarns Rederi A/S, 545 F. 2d 854 (3 Cir. 1976)	10
Cella v. Partenreederi MS Ravenna, 529 F. 2d 15 (1 Cir. 1975)	11
Davis v. U. S. Lines Co., 253 F. 2d 262 (3 Cir. 1958)	11
Haynes v. Rederi A/S Aladdin, 362 F. 2d 345 (5 Cir. 1966)	11
Johnson v. Sword Line, 257 F. 2d 541 (3 Cir. 1958)	10
Lamar v. Admiral Shipping Corp., 476 F. 2d 300 (5 Cir. 1973)	11
Sessler v. Allied Towing Corp., 538 F. 2d 630 (4 Cir. 1976)	11
The Etna, 138 F. 2d 37 (3 Cir. 1943)	10
U. S. Constitution:	
Fifth Amendment	2
Statutes:	
Longshoremen's and Harbor Workers' Compensation Act ("LHWCA') (33 U. S. C. § 933)	1, 10

BRIEF IN OPPOSITION.

Respondent Atlantic & Gulf Stevedores, Inc. files this brief in opposition to the petition for writ of certiorari filed by petitioner Robert J. Benson and respectfully suggests that the petition be denied.

COUNTER-STATEMENT OF THE QUESTION PRESENTED.

Did the district court and the court of appeals correctly decide, in this maritime personal injury action which arose before the effective date of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, that, after being paid the compensation benefits to which he was entitled and that portion of the judgment against the ship in excess of those payments, and after unsuccessfully claiming previously in the district court and in the court of appeals that the balance of the judgment should be paid to him because the employer had waived or forfeited its compensation lien, the employee and his attorney may not then insist upon payment of the subrogated balance of the judgment so that the attorney can extract a fee from it, when the employee and his attorney did not raise the attorney's lien in the original challenge to the employer's subrogation claim, when the employee and his attorney recognize that the attorney is not entitled to a fee on the employer's share of the judgment, and when the employee and his attorney no longer contest the district court's order which permitted the employer to receive or retain a sum equal to its lien from the proceeds of the judgment?

CONSTITUTIONAL PROVISIONS.

Petitioner claims that the decisions of the lower courts violated the due process clause of the Fifth Amendment to the United States Constitution. The Amendment is reproduced in full at page 3 of the Petition for Writ of Certiorari. Respondent believes that due process has been afforded to petitioner and his attorney and that this matter presents no occasion appropriate for review by this Honorable Court.

COUNTER-STATEMENT OF THE CASE.

Respondent accepts petitioner's statement of the case as accurate up to the time of this Court's denial of his first petition for writ of certiorari in 1974. Petitioner's presentation of subsequent events compels a counter-statement to make it clear that the lower courts reached the correct result because petitioner's claim, that the subrogated portion of the verdict should first have been paid to him so that his attorney could extract a fee from it before paying the balance to the employer, has no merit, because the claim was waived when it was not raised at the time respondents sought to have the judgment marked satisfied after only the portion of the judgment in excess of the amount of the employer's compensation lien plus interest and costs was paid, and because the approach advanced by petitioner would have resulted in less money for the employee, more expenditures by the employer, and the collection of an additional fee by the employee's attorney to be paid from and claimed for the recovery of a sum to which the employer alone was entitled.

On March 25, 1974, American Export and A&G filed a joint motion seeking leave for American Export to

deposit into court a sum equal to the full amount of plaintiff's costs and the amount of the verdict in excess of A&G's compensation payments with interest on that excess amount, and to have the judgment marked satisfied when that was done. In response to this motion, plaintiff asserted that A&G had waived or forfeited its lien by defending the ship at trial and that he was entitled to interest on the full amount of the reinstated verdict. He then asked the district court "to enter an order permitting payment into Court any sum that defendant or any other person or entity asking for it wish to have credited against the judgment, interest and costs due the plaintiff, without prejudice to plaintiff's right to issue execution for the remainder until the entire sum due is paid; and to further order that the Clerk shall pay all sums received immediately to plaintiff; and to declare and adjudge that Atlantic & Gulf Stevedores, Inc., is not entitled to be subrogated to and does not have any equitable lien or other right to any portion of plaintiff's recovery". On April 3, 1974, the joint motion was amended to reflect adjustments of the amounts at issue necessitated by the additional compensation payments made by A&G to plaintiff. In response to the amended motion plaintiff raised the same challenges and the same prayer for relief asserted in his original answer. Although the joint motion and the amendment asked that the judgment be marked in full when only the excess portion, interest and costs were paid to plaintiff, plaintiff never claimed that the balance should also be paid to him so that his attorney could extract a fee from it.

Because of the dispute between the employer and employee concerning the asserted compensation lien, the ship's own counsel filed a motion to permit the ship to deposit the sum of $56,157.49 into court in partial payment of the $69,469.76 verdict and of the costs and interest at

issue.[1] In his answer to this motion, plaintiff stated that he did not oppose the motion, requested that American Export's proposed order be supplemented by a provision for immediate payment of the deposit by the clerk to plaintiff, and averred "that the balance of the judgment, interest and costs due to him after the payment of the amount proposed by defendant is more than sufficient to pay the entire amount claimed by [the employer] in reimbursement of its payments of compensation benefits if that claim should be sustained by the court". The sum proposed by the ship and welcomed by plaintiff was sufficient to pay plaintiff's costs in full, the difference between the amount of the verdict and the amount of the employer's compensation lien asserted in the April 3, 1974 amendment to the joint motion, plus interest to date on that difference.[2] On June 5, 1974 the district court entered an order allowing American Export to deposit the proposed sum into court and directing its immediate repayment by the clerk to plaintiff. The deposit was made and plaintiff was paid $56,157.49 on June 10, 1975.

On November 25, 1974 the original joint motion seeking to have the judgment marked satisfied was again amended and supported by another affidavit from the employer. Plaintiff opposed this motion for the reasons he originally raised, including his claim to interest on the full amount of the verdict. Even with this third opportunity to do so, plaintiff again did not claim that even if the employer's lien were upheld, the subrogated amount

1. Although page 4 of the Petition for Writ of Certiorari suggests that the ship's motion was filed before the joint motion and the first amended joint motion, the district court docket indicates that the joint motion and plaintiff's answer were filed on March 25, 1974, and the ship's motion, plaintiff's answer to the ship's motion, and plaintiff's answer to the first amended joint motion were filed on April 10, 1974.

2. Contrary to petitioner's suggestion (Petition, p. 4), the amount was not determined on the basis of two-thirds of the judgment.

at issue should first be paid to him so that his attorney might extract a fee from it before paying the balance to the employer.

On April 11, 1975, in response to the joint motion, the district court entered this order:

> "And now, this 11th day of April, 1975, it is ordered that Atlantic & Gulf Stevedores, Inc. is entitled to receive or retain, from the proceeds of the judgment in this case, a sum equal to the amount of its compensation lien as of the date of entry of judgment, with interest thereon from the date of entry of judgment, plus the amount of any compensation paid to plaintiff since that date, with interest thereon from the date of payment. Upon payment to the plaintiff, or deposit in the registry of this Court, of the balance of the judgment, interest and costs, the judgment shall be marked satisfied".

In its as-yet unpublished supporting memorandum (reproduced in the appendix to the Petition for Writ of Certiorari, the district court held that (1) the employer is entitled to full payment of its lien, without deduction of attorney's fees and costs, at least in cases where the total recovery from third parties exceeds the total compensation payable by the employer, (2) the employee is entitled to post-judgment interest only on that portion of the judgment which exceeds the employer's lien, and (3) the employer did not waive or forfeit its lien in this case.

On May 9, 1975, plaintiff again appealed to the Third Circuit (No. 75-1642; "Benson II"), claiming only that the district court erred in holding that A&G had not waived or forfeited its lien. On January 13, 1976, the court of appeals entered a judgment order without opinion stating,

> "Appellant Benson, a longshoreman, contends that the district court erred in enforcing a lien on a judg-

ment in his favor against American Export Isbrandtsen Lines, Inc., in favor of his employer, Atlantic & Gulf Stevedores, Inc., a stevedore. We find no error.

"It is therefore ORDERED and ADJUDGED that the judgment of the district court is affirmed. Costs taxed against appellant".

The third appeal ("Benson III"), the target of the petition for certiorari, arises from a motion filed by A&G's attorney on June 22, 1977 to stay execution and mark the judgment satisfied. The motion was supported by an affidavit from A&G's claims manager establishing that the employer's compensation lien totalled $37,105.21 as of March 22, 1977. A&G sought an order staying execution, marking the judgment completely satisfied, and "acknowledging a credit on future compensation benefits in favor of the employer in the amount by which its LHWCA payments plus interest thereon exceed the unpaid verdict balance". Plaintiff opposed this motion and asked the district court to issue an order

". . . that [American Export] shall pay the balance of the judgment, interest and costs to plaintiff whereupon the subject judgment shall be marked satisfied, and after payment of the counsel fees and other proper charges of counsel for plaintiff, plaintiff shall pay the balance of said recovery to [A&G] to be credited against its proper charges for compensation and medical expense benefits paid to plaintiff, pursuant to its right of subrogation, and to order that any balance thereof remaining due after said payment, shall be repaid by plaintiff in the form of credits to [A&G] against future compensation benefits as they become payable to plaintiff until [A&G] has received full credit for all sums now due".

The purpose of plaintiff's prayer was to permit his attorney to recover and keep one-third of the outstanding amount as part of his contingent fee. Plaintiff's answer to the motion was accompanied by an affidavit from his attorney regarding his fee arrangement and stating that the $56,157.49 paid by the ship in 1974 "was distributed as follows: total costs and expenses, $3,951.09; counsel fee, 33⅓% of net recovery, $17,402.13; net proceeds to client, $34,804.27".[3]

On July 14, 1978, the district court entered an order granting A&G's motion and directing the clerk to mark the judgment satisfied. In its supporting memorandum, the district court held that the issues raised in this motion had been decided in *Benson II*, that "it is very clear that the full amount of the judgment, over and above the lien of the third-party defendant [A&G], has been paid to the plaintiff," and that A&G was entitled to a credit, with the final adjustment of the compensation account left to the compensation authorities. The case was argued before a three-judge panel of the court of appeals on June 5, 1979, and on June 8, 1979, the court entered a judgment order affirming the district court. Without asking for either a panel or an en banc rehearing by the court of appeals, plaintiff then filed this Petition for Writ of Certiorari, claiming that the district court and the court of appeals deprived him and his attorney of property without due process by holding that the issue had been resolved by the district court's April 11, 1975 order which was affirmed on appeal. For the reasons that follow, A&G believes that the result reached below was correct, that neither petitioner nor his attorney have been deprived of property, and that the petition for writ of certiorari should be denied.

3. If the approach outlined at page 12 of the Petition for Writ of Certiorari had been followed, the employee would have received $6,672.74 less than he did.

COUNTER-ARGUMENT.

From March 25, 1974, when the district court received the employee's answer to the joint motion seeking to have the judgment marked satisfied upon payment into court of a sum equal to the difference between the amount of the judgment and the amount of the employer's lien plus interest on that difference and the employee's record costs, to April 11, 1975, when the district court entered its order allowing the employer to retain from the judgment a sum equal to the amount of its compensation payments plus interest, and allowing the judgment to be marked satisfied when the employee had been paid the balance of the judgment, petitioner and his attorney had ample opportunity to raise their contention that the entire amount of the judgment should first be paid to him so that the attorney could extract a fee and then pay whatever might be left over to the employer. The joint motion, the amended joint motion, and the second amended joint motion, particularly the prayers for relief in those motions, made it clear that respondents were seeking to have that judgment marked satisfied upon payment of less than the face amount of the judgment. The prayer for relief in the joint motion stated:

> "WHEREFORE, defendant and third party defendant pray that this Honorable Court issue an Order pursuant to 28 U. S. C. § 2041 and F. R. C. P. 67 ordering defendant American Export Isbrandtsen Lines, Inc. to pay into the Court the sum of $46,408.55 plus interest at 6 percent from January 26, 1971 on the said sum, plus $1,393.54 in costs, and that upon payment of said sum the Clerk of this Honorable Court be ordered to mark the judgment in favor of Robert Benson against American Export Isbrandtsen Lines, Inc., in the amount of $69,469.76 satisfied."[4]

Although petitioner and his attorney opposed the motions by claiming interest on the entire amount of the judgment and by challenging the viability of the employer's lien, they did not suggest a different procedure from that sought by the motions.

The effect of an order granting these prayers for relief upon the contingent fee agreement between the employee and his attorney should have been obvious to the attorney: his client would never be paid the full amount of the judgment against the ship and he would not be able to charge his fee against the full amount of the verdict. Rather than showing that the employee and his attorney were deprived of property without due process of law, the record in this case clearly indicates that the employee and his attorney each received what was legally due to him, and that the payment and satisfaction procedure was established by the April 11, 1975 order with full notice to the employee and his attorney of that procedure and with full opportunity for them to object to that procedure.

When the employee's attorney received the amended joint motion and the ship's motion to deposit the sum of $56,157.49 in court, it should have been obvious to him that his client would not be entitled to more than that sum, since it represented the difference between the amount of compensation he had been paid and the verdict plus interest on that difference and his record costs, unless the employee successfully contested the interest, lien, and satisfaction claims raised by the joint motions. As the

4. The prayers for relief in the amended and second amended motions are identical to this except for the first dollar figure which decreases in each amendment.

employee's attorney recognizes in this Court (Petition for Writ of Certiorari, p. 11), the amount proposed by the ship was the sum of $45,768 55 toward the verdict, plus interest on that amount, plus $1,393.54 toward the costs. That amount is the exact amount proposed by the amended motion's prayer for relief to be paid in satisfaction of the judgment. Nevertheless, the employee and his attorney accepted this amount from the ship and did not challenge the satisfaction and payment procedures of the three joint motions.

Neither petitioner nor his attorney were deprived of property without due process not only because they had notice and the opportunity to be heard, but also because their claim runs contrary to the position they took in the court of appeals, and contrary to the interests of the employee and the employer as defined in the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA") (33 U. S. C. § 933).

Under the terms of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) (33 U. S. C. § 933), it is clear that a plaintiff longshoreman cannot retain both a jury verdict against a ship and the compensation benefits paid or payable by his employer in their full amounts, *The Etna*, 138 F. 2d 37 (3 Cir. 1943); *Johnson v. Sword Line*, 257 F. 2d 541 (3 Cir. 1958); *Brown v. Ivarns Rederi A/S*, 545 F. 2d 854, 859 n. 6 (3 Cir. 1976). Where, as in this case, the jury verdict exceeds the amount of compensation benefits paid by the employer, the employer is entitled to the full amount of its payments plus interest, and the employee is entitled only to the excess verdict amount; the employee bears his own litigation costs and, because there is no agreement so providing, the employer has no obligation to pay the employee's attorney a fee based upon the amount of

compensation payments, *Davis v. U. S. Lines Co.*, 253 F. 2d 262 (3 Cir. 1958); *see also, Haynes v. Rederi A/S Aladdin*, 362 F. 2d 345 (5 Cir. 1966); *Ballwanz v. Tarka Corp. of Baltimore*, 382 F. 2d 433 (4 Cir. 1967); *Lamar v. Admiral Shipping Corp.*, 476 F. 2d 300, 302 (5 Cir. 1973); *Cella v. Partenreederi MS Ravenna*, 529 F. 2d 15 (1 Cir. 1975); *Sessler v. Allied Towing Corp.*, 538 F. 2d 630, 633 (4 Cir. 1976). In apparent recognition of these principles, the employee stated to the court of appeals that he is not contending that the stevedore must share ratably in payment of plaintiff's counsel fees as was the case in *Davis v. U. S. Lines Co.*, 253 F. 2d 262 (C. A. 3, 1958)" (Brief for Appellant at 19), and that he "has no quarrel with the rule of *Davis v. U. S. Lines Co., supra,* nor with [the district court's] order of April 11, 1975, and its affirmance by this court" (*Id.*, p. 20).

The April 11 order, with which petitioner had no dispute, provided explicitly that the judgment could be marked satisfied when he had been paid the difference between the amount of the verdict, interest and costs and the amount of compensation payments. The effect of this order was to preserve to the employer and the employee the amounts that they were then entitled under the principles applicable to this case and in complete harmony with *Davis, supra.* This result was achieved when, pursuant to the June 5, 1974 order with which petitioner also had no dispute, petitioner had been paid his costs in full, the difference between the amount of the verdict ($69,469.76) and the record amount of the lien ($23,701.21), and interest on that difference from the date of judgment, when the ship paid its $56,157.49:

verdict	$69,469.76
less record lien	(23,701.21)
employee's portion of verdict	45,768.55
plus taxed costs	1,393.54
plus interest on employee's portion of verdict	8,995.40
Total	$56,157.49

By conceding in the court of appeals that the employer was entitled to its lien, that the employer did not owe a fee to the employee's attorney for the recovery of that lien, and that the attorney's contingent fee agreement with the employee did not entitle him to "any fee because of payments of compensation to the longshoreman by the stevedore, whether they were erroneous overpayments or not" (Petition for Writ of Certiorari, p. 11), petitioner and his attorney actually conceded that they were not entitled to anything more than what they had been paid. Petitioner had been paid all but $23,701.21 of the judgment against the ship. That sum was the amount of the employer's lien as of March 26, 1974. Obviously, that lien could not have been discharged if the employee's attorney extracted a fee from that sum.

It is equally obvious that petitioner would have realized less than he has if the procedure advanced by his Petition for Writ of Certiorari (p. 12) were followed. Instead of the $34,804.27 that he received from the ship's payment of $56,157.49, petitioner would have realized only $28,131.81 from a payment of $85,105.60.

CONCLUSION.

The procedure that petitioner wants this Honorable Court to review complied with the LHWCA and realized the most for the employee and the employer from the judgment against the ship. The procedure was a practical and frequently applied method of settling the employer's compensation lien. There is no need for this Honorable Court to review that procedure because both petitioner and his attorney have been afforded due process of law.

Respectfully submitted,

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